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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
	)	
	)	

COMMENTS OF DELMARVA POWER & LIGHT COMPANY

Submitted by:

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May 20, 1996

Delmarva Power & Light Company
May 20, 1996

SUMMARY

Delmarva Power & Light Company ("Delmarva") is an electric utility which provides electric service to retain and wholesale customers on the Delmarva Peninsula which includes the state of Delaware, ten primarily Eastern Shore counties in Maryland and the Eastern Shore area of Virginia. The Peninsula covers about 6,000 square miles and has a population of approximately 1.1 million. Delmarva also provides gas service to retain and transportation customers in northern Delaware, including the City of Wilmington. Delmarva is also exploring potential opportunities in the telecommunications business. Delmarva owns thousands of distribution poles and controls numerous ducts, conduits, and rights-of-way, all of which are part of its core infrastructure by which it provides electric service. Delmarva accordingly has a vital interest in the outcome of this proceeding.

The electric power industry is the primary engine that drives every aspect of the U.S. economy. It is heavily regulated by both Federal and state agencies. Electric utility companies are regulated monopolies in defined service territories. Federal and state regulatory structures are changing rapidly to allow competition and to require access to transmission and distribution facilities. In the midst of this regulatory turmoil, it is prudent for the Commission to continue to exercise its discretion to decline to adopt any substantive rules which could affect the transmission and distribution networks of the electric power industry. First, neither Section 224 nor Section 251 requires the Commission to adopt regulations specifically governing the mandatory access provisions of Section 224(f)(1). Second, neither the Commission nor the Commission Staff has the experience necessary to regulate substantive aspects of the electric power industry. Third, the

Commission cannot foresee the myriad factual circumstances in which access to poles, ducts, conduits and rights-of-way would be raised. Accordingly, the Commission should follow its own precedent and the Supreme Court's guidance in Chenery II and rely upon its well-developed common carrier nondiscrimination jurisprudence to adjudicate pole attachment access disputes. Rigid rules are inadvisable at this early stage of regulation of the electric utility industry.

If the FCC determines to adopt specific rules or policies in response to the NPRM's questions:

1. Affiliates of electric utilities should be afforded access on comparable terms as third-party telecommunications carriers, but encumbering access of owners to their own facilities is contrary to the public interest

2. In considering access to facilities by telecommunications carriers, the Commission should take into account existing available capacity (whether it be wire or wireless) already attached to the utility's system and whether there is need for additional capacity. Furthermore, issues of reliability and practicality may require telecommunications carriers to have nondiscriminatory access to utility cables in ducts and conduits, rather than access to run additional cables in those ducts and conduits.

3. The Commission should defer to state regulation, local zoning ordinances and existing practice in considering access to facilities and ensure that the attaching parties are responsible for all related fees and all other costs associated with modifying the use of existing facilities for the benefit of an attaching party

4. The maximum number of possible attachments to poles, and the capacity of ducts, conduits, and rights-of-way, should be determined on an engineering basis by reference to applicable engineering codes, and the electric utility must be able to reserve capacity for reliability and its own projected expansion needs

5. Electric utilities should have wide latitude to determine what constitutes valid safety, reliability, or generally-applicable engineering purposes under Section 224(f)(2). Electric utilities should bear the burden of proof but their engineering analyses should be considered a rebuttable presumption.

6. The Commission should require compliance with the National Electrical Safety Code and structural integrity requirements.

7. Notice to attaching entities by an electric utility of intention to modify a facility should be given by first class mail, postage prepaid, ten days in advance. The Commission should establish a two-year grace period for validation of pole attachment databases.

8. Telecommunication carriers should be prohibited from making any attachments without first obtaining the facility owner's concurrence.

9. Make-ready costs should be shared by the number of attaching entities that elect to add to or to modify their attachments; they should not be offset by potential revenue increases; the Commission should not restrict the facility owner's right to modify its facilities.

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COMMENTS OF DELMARVA POWER & LIGHT COMPANY

Delmarva Power & Light Company ("Delmarva"), by its attorneys and pursuant to Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553 (1994) and the Commission's Notice of Proposed Rulemaking (the "NPRM") in the above-captioned docket adopted April 19, 1996, hereby submits it Comments. This NPRM is intended to implement the local exchange telephone company ("LEC") interconnection requirements in new Section 251 of the Communications Act of 1934 (the "1934 Act"), added by Section 101 of the Telecommunications Act of 1996 (the "1996 Act"). Section 251(b)(4) imposes upon a LEC the "duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224." A small portion of the NPRM (¶¶ 220-225) relates to implementation of Section 224 as it relates to pole attachments. It appears this section would be applicable to electric utilities as well as LECs. Delmarva's comments are directed towards and limited to the Commission's inquiries regarding pole attachments in the NPRM ¶¶ 220-225, as those rules would apply to electric utility companies.

Delmarva Power & Light Company
May 20, 1996

I. INTRODUCTION

Delmarva Power & Light Company is an investor-owned electric utility which provides electric service in Delaware, Maryland, primarily ten Eastern Shore counties, and the Eastern Shore of Virginia. The company also provides gas service to retail and transportation customers in northern Delaware and has recently begun to explore telecommunications business opportunities. Delmarva owns thousands of distribution poles and controls numerous ducts, conduits, and rights-of-way, all of which are part of its core infrastructure by which it provides electric service. Delmarva accordingly has a vital interest in the outcome of this proceeding.

The Commission indicated that it would address only the issues raised under Section 224(f) and Section 224(h) in the context of the interconnection requirements of Section 251(b)(4). NPRM ¶ 221. The Commission requested comments on specific questions relating to three broad issues: (1) "nondiscriminatory access[,]"[1/] which will be addressed in Part II below; (2) denial of access for want of capacity or "for reasons of safety, reliability, and generally applicable engineering purposes[,]"[2/] which will be addressed in Part III below; and (3) issues relating to modification of a pole, duct, conduit, or right-of-way,[3/] which will be addressed in Part IV below.

II. THE COMMISSION SHOULD ADOPT RULES RELATING ONLY TO RATES AND PROCEDURE UNTIL IT HAS GAINED KNOWLEDGE AND EXPERIENCE IN REGULATING THE ELECTRIC POWER INDUSTRY

In this rulemaking and the more comprehensive pole attachment rulemaking to follow, the Commission should act cautiously. First, the Commission must bear in mind that the electric power industry is the primary engine that drives every aspect of the U.S. economy.[4/] In 1994 alone, over $200 billion of electricity was consumed in the United States.[5/] Industrial and commercial firms consume about two thirds of all electricity in the United States.[6/] Electric service is vital to the success of every business activity and every commercial establishment in America.

Second, the Commission must recognize its own inexperience in regulating any substantive aspect of the electric power industry. While the FCC has regulated pole attachment rates for many years, regulating rates is fundamentally different than substantive regulation affecting the reliability of electric service to the public. Neither the Commission nor its staff have yet developed the knowledge and experience to adopt substantive regulations that will affect technical aspects of the electric power industry. Neither can the Commission nor its staff amass this knowledge and experience on the accelerated timetable mandated by the 1996 Act for adopting final interconnection rules.

Third, neither Section 224 nor Section 251 requires the Commission to adopt regulations specifically governing the mandatory access provisions of Section 224(f)(1). For these reasons,

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4/ Energy Information Admin , U.S. Dep't. of Energy, Energy Information Sheets 33 (1995).

5/ Energy Information Admin , U.S. Dep't. of Energy, Annual Energy Review 1994 229, 249 (1995).

6/ Id. at 239.

the Commission initially should proceed by adjudication rather than rulemaking in deciding technical issues that could affect reliability of the nation's electric power industry.

A. The Commission Should Rely Upon Its Well-Developed Common Carrier Nondiscrimination Jurisprudence to Adjudicate Pole Attachment Access Disputes

In the NPRM, the Commission seeks comments regarding the meaning of "nondiscriminatory access" as that term is used in Section 224(f)[7] of the 1934 Act, as amended by Section 703 of the 1996 Act.[8]

In the more than fifty years since initial enactment of Title II of the 1934 Act, the Commission on numerous occasions has determined the meaning of the term "nondiscriminatory" in the context of its common carrier jurisdiction.[9] This well-developed body of law, as well as the

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[7] Section 224(f) provides:
(1) A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.
(2) Notwithstanding paragraph (1), a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.

[8] Specific questions include: "[T]o what extent must a LEC provide access to poles, ducts, conduits, and rights-of-way on similar terms to all requesting telecommunications carriers? Must those terms be the same as the carrier applies to itself or an affiliate for similar uses? Are there any legitimate bases for distinguishing conditions of access?" NPRM ¶ 222.

[9] See, e.g., Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, 8 F.C.C. Rcd. 4478, 4482 (1993) (holding LECs must provide nondiscriminatory access to billing name and address data to IXCs); Cellular Telephone Co., 3 F.C.C. Rcd. 6274, 6275 (1988) (holding resale prohibitions are unreasonably discriminatory); In re Lincoln Telephone and Telegraph's Duty to Furnish Interconnection Facilities, 72 F.C.C. 2d 724 (1979) (holding an independent phone company must interconnect with MCI); In re Warrensburg Cable, Inc., 48 F.C.C.2d 893, 896 (Rev. Bd. 1974) (holding a LEC unreasonably discriminated against a CATV system in denying access to its poles) .

similar bodies of law developed by agencies such as the Interstate Commerce Commission with respect to interstate railroads and motor carriers, and the Federal Energy Regulatory Commission with respect to pipelines, is readily and appropriately applied in the context of pole attachments.[10/] The Commission need make only the obvious adjustments necessary with respect to the factual distinctions. Under the circumstances, the most prudent course for the Commission is to exercise its discretion under Chenery II[11/] and to decline to issue a comprehensive set of rules with regard to the meaning of the term "nondiscriminatory access" in Section 224(f) at this time. Rather, the Commission should for the present resolve any disputes by adjudication. It is worthy of note that when the Commission in 1978 first assumed jurisdiction over pole attachments, it initially declined to adopt any substantive rules relating to the reasonableness of non-price terms of pole attachment agreements because it had no experience regulating electric utilities. [12/]

The Supreme Court opined in Chenery II that an agency may exercise its "informed discretion" to proceed by adjudication rather than by rulemaking where it "may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard

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[10/] In fact, the Commission used its common carrier jurisdiction to require cable television access to LEC poles long before Section 224 was enacted. See In re Warrensburg Cable, 48 F.C.C.2d 893, 896 (Rev. Bd. 1974).

[11/] Securities and Exchange Commission v. Chenery, 332 U.S. 194 (1947) ("Chenery II"). Chenery II holds that in the absence of a statutory mandate, the choice between rulemaking and adjudication lies solely in an agency's informed discretion. Id. at 203. Section 224(e)(1) requires that the Commission adopt regulations only to "govern the charges for pole attachments used by telecommunications carriers[.]"

[12/] See Adoption of Rules For The Regulation of Cable Television Pole Attachments, First Report and Order, 68 F.C.C. 2d 1585, 1590 (1978); Adoption of Rules For The Regulation of Cable Television Pole Attachments, Second Report and Order, 72 F.C.C. 2d 59, 74-75 (1979).

and fast rule."[13/] Chenery II is particularly apropos in this instance. This Commission has very little experience with the electric utility industry and can not be expected to be aware of the vital factors affecting this industry. The Commission Staff has impressive technical expertise with respect to the design, engineering, and use of RF devices, computers, and wired telecommunications networks. However, the talented Staff does not possess similar expertise with respect to power engineering of high voltage electric transmission and distribution networks. The Staff will be unable to amass sufficient expertise to enable it to promulgate well-reasoned technical regulations within the six-month statutory deadline for adopting rules implementing Section 251.

The Commission has for many years regulated the rates for pole attachments. However, this experience is not germane. The engineering and public policy considerations concerning access to utility property are altogether different than economic factors affecting the rates to be charged for such access. Until the recent amendments enacted by the 1996 Act, the FCC did not have jurisdiction to regulate access to electric utility property. Indeed, as the Supreme Court stated in 1987, nothing in the original Section 224 gave cable companies any right to occupy space on utility poles, or prohibits utility companies from refusing to enter into attachment agreements with cable operators."[14/] For the first time, the FCC now must regulate access to electric utility property.

Furthermore, the Commission cannot foresee the myriad of factual circumstances in which its rule would apply. There are tens of millions of distribution poles in use throughout the United

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[13/] Chenery II, 332 U.S. at 203

[14/] Federal Communications Comm'n v. Florida Power Corp., 480 U.S. 245, 251 (1987).

States. They are planted in cities; in rural areas; in areas in which the critical structural factors may be ice load, wind load, or violent storms; in near rain-forest conditions and in desert conditions; in soil types ranging from swampland to loam to clay to rocks. Distribution poles support an incredible variety of power distribution equipment. Delmarva itself, which has a relatively compact service territory in comparison to some utilities, owns more than 190,000 poles in service. Every mandatory access complaint the Commission adjudicates will involve unique factual circumstances which the Commission cannot possibly, much less reasonably, foresee. Moreover, ducts, conduits, and rights-of-way present different technical considerations than distribution poles. In this regard, the Supreme Court has recognized that an agency's inability to foresee problems is a valid reason for an agency to proceed by adjudication rather than by rulemaking.[15/]

In the context of our position disfavoring rulemaking on the meaning of the term "nondiscriminatory access," we address the Commission's specific requests for comments in the remainder of this section.

B. Affiliates of Facilities Owners Should Be Afforded Access on the Same Terms as Third-Party Telecommunications Carriers, But Encumbering Access of Owners To Their Own Facilities Is Contrary to the Public Interest

The Commission specifically requested comments regarding whether "terms [of access for third-party carriers must] be the same as the carrier applies to itself or an affiliate for similar uses."[16/]

[15/] Chenery II, 332 U.S. at 203

[16/] NPRM ¶ 222.

Public utilities, including utilities such as Delmarva that are not holding companies, are presently considering providing telecommunications services to the public. While Congress did not specifically address individual investor-owned utilities like Delmarva, Congress clearly considers that the entry of public utilities into the telecommunications business is in the public interest. This belief is evidenced by Section 103 of the 1996 Act, which permits holding companies registered under Section 5 of PUHCA[17/] to provide telecommunications services to the public so long as they do so through a subsidiary which has been granted Exempt Telecommunications Company status by this Commission.

Delmarva recognizes that it would be inappropriate for an electric utility or its telecommunications affiliate to be able to gain a competitive advantage over independent telecommunications carriers due to preferential terms or conditions of access to the poles, ducts, conduits and rights-of-way of the electric utility. In each of the states in which Delmarva provides electric service, cross-subsidization is precluded by regulatory requirements for proper accounting and allocations of costs, and some affiliate transactions are subject to regulation under the Virginia Affiliates Act.[18/] Accordingly, it would be appropriate for the Commission in any rulemaking, to require an electric utility to afford comparable access to its facilities for affiliates and third-party telecommunications carriers.

The Commission also requested comment as to whether the owner (i.e., the electric utility itself) of the pole should be precluded from attaching its own equipment except under the

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[17/] Public Utility Holding Company Act of 1935 § 5, 15 U.S.C. § 79e (1994) ("PUHCA").

[18/] Va. Code Ann. §§ 56-76 to 56-87 (Michie 1995).

identical (or similar) terms as those offered to telecommunications carriers.[19/] A rule limiting the right of a public utility to make utility attachments to its own poles would be untenable. It is important for the Commission to recognize that the utility's internal communications uses often are necessary to ensure the proper functioning of the electric system or public safety. In addition, it would infringe on the property interests of the facility owner and could interfere with the utility's obligation to provide electric service to the public.

Moreover, the reasons underlying common terms and conditions demonstrate that they are unnecessary with respect to the electric utility itself. For instance, terms and conditions that might be applied to a telecommunications carrier may involve identification of the telecommunications equipage to be attached to a pole. This information enables the pole owner to do a structural analysis to ensure that the pole can support the projected load, especially for wireless antennae. This may include an analysis of equipment with which the electric utility engineers are unfamiliar, and time must be provided to permit that analysis to be accurately completed. On the other hand, the types and amounts of structural loads of power utility material is well known to electric utility engineers, with the pole itself having been selected in order to support this utility equipage. Other terms and conditions might be applied to telecommunications carriers to enable the electric utility to ascertain that sufficient usable space is available on particular poles for a desired telecommunications attachment.

19/ "Must those terms [for access to poles, ducts, conduits, and rights-of-way] be the same as the carrier applies to itself or an affiliate for similar uses?" NPRM ¶ 222 (emphasis added).

With respect to telecommunications carriers, the electric utility must know attachment information well before the desired effective date in order to coordinate these attachments. Usable space in the telecommunications section of distribution poles may be at a premium, particularly as additional telecommunications carriers begin competing with incumbent LECs and cable television systems. Wireless carriers may desire attachments of heavy antenna arrays potentially affecting structural integrity. Moreover, the utility must require the telecommunications carrier to provide specific information regarding the location, equipment types, and so forth, regarding each attachment in order to maintain an accurate database of attachments.[20/]

As the above discussion demonstrates, different needs and concerns regarding telecommunications attachments will require some legitimate procedural terms and conditions that are unneeded with respect to the pole owner. The Commission should recognize this and not adopt regulations limiting the ability of pole owners to make attachments to their own poles.

C. The Commission Should Consider State Regulations in Mandating Access to Poles, Ducts, Conduits, and Rights-of-Way

The Commission specifically requested comment regarding whether there are "any legitimate bases for distinguishing conditions of access." NPRM ¶ 222.

Conditions of access should be distinguished on the basis of state regulations and local zoning ordinances. First, electric utilities are subject to state and local regulation wholly apart

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[20/] Under Section 224(h) as amended by the 1996 Act, the accuracy of this database is very important. New Section 224(h) requires facilities owners to provide written notice of intended facilities modifications to all attaching entities. Database integrity is a problem facing all pole owners because cable television operators frequently make attachments without even informing the utility.

from the pole attachment provisions in Section 224. Such regulations (particularly health and safety regulations) are not preempted by Section 224. The potential exists for such state regulations to be at odds with a rule, if the Commission were to adopt one, that arbitrarily mandates absolute access by all telecommunications carriers to distribution poles. Inconsistent requirements could expose an electric utility to state liability for compliance with the FCC regulations, and vice-versa.

Second, certain attachments could violate applicable local zoning restrictions. For instance, a wireless antenna mounted on a distribution pole may exceed the maximum permissible height. Similarly, zoning ordinances may prohibit the ground location of radio transmission equipment in rights-of-way, even if the antenna itself might otherwise be permitted. The Commission's access rules, if adopted, clearly should state that they do not preempt local zoning ordinances and that access is subject to compliance with them. Moreover, the Commission should require that if zoning action is necessary, the entity requesting attachments, and not the owner of the pole, is required to submit and prosecute in its own name any required zoning applications, building permit applications, and other applications to local authorities. Further, the Commission should require the attaching entity to coordinate such applications with the owner of the pole prior to submission. The Commission should also require that the entity desiring attachments, and not the owner of the pole, must pay all zoning or other application fees, counsel fees, and all other costs associated with such applications (including the full cost -- wages/benefits/out-of-pocket expenses -- of electric utility employees for actual time spent on zoning activities on the attaching party's behalf).

III. COMMENTS RELATING TO CAPACITY CONSTRAINTS, DENIAL OF ACCESS FOR SAFETY, RELIABILITY, AND GENERALLY-APPLICABLE ENGINEERING PURPOSES

A. "Capacity" Should Be Determined On An Engineering Basis, With The Facility Owner Being Permitted To Reserve Reasonable Capacity for Reliability and Expansion

The Commission seeks comments on "specific standards under section 224(f)(2) for determining when a utility has 'insufficient capacity' to permit access."[21/]

The maximum number of possible attachments should generally be determined on an engineering basis by reference to applicable engineering codes. For instance, the number of permissible attachments on a pole of a given height can readily be determined by reference to the National Electrical Safety Code. The capacity of ducts, conduits, and rights-of-way may similarly be calculated.

A more significant question involves the extent to which an electric utility should be able to reserve capacity for its own use to ensure reliability and for future expansion. In the first instance, the Commission should distinguish between the utility itself and its telecommunications affiliates. As noted above in Part II.B, a utility's telecommunications affiliates should receive comparable treatment as that given to third-party telecommunications carriers. This equivalent, nondiscriminatory treatment should encompass the ability to reserve capacity, in addition to other terms and conditions.

The electric utility itself, however, must have greater rights. A utility's decision as to the sizing of poles, conduits, ducts, or rights-of-way is made by determining its present and future

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[21/] NPRM ¶ 223.

needs for its electric power business. State commissions will not permit deliberate over-construction of facilities (such as speculative construction for potential attachment revenue) to be recovered in a utility's rates, and are not at all hesitant to disallow such costs.[22/] Until the 1996 Act, the utility could be confident that the reserve capacity thus designed into its system would be secure, because the decision whether to rent attachment space was in the sole discretion of the utility.[23/] The 1996 Act, however, changes this paradigm, mandating access to third parties. In the context of distribution poles, the threat to future electric utility needs may be minimal, because distribution poles must be some minimal height (about 35 feet) to comply with the National Electrical Safety Code minimum conductor height requirements, which in most cases will be sufficient to support several attachments. In the context of existing underground ducts and conduits, which are extremely expensive to install and important to reliability, the threat to existing and future utility requirements may be acute unless the conduit or duct owner is permitted to reserve capacity.

The Commission must permit electric utilities to retain reasonable reserve capacity to support existing and future needs With respect to conduit systems, capacity for future expansion is only part of the concern. Electric utilities also require reserve conduit capacity to address cable failures in the conduit. In the event of such a failure, the most expeditious way to return customers to service is to install new cable in an adjacent conduit, and remedy the fault in, or remove the old cable after service has been restored. The utilities need to retain reserve capacity for reliability is particularly important in light of Section 224(i) (which precludes a utility from requiring

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22/ See, e.g., Re Southern California Gas Co., 135 P.U.R. 4th 329, 358-59 (Cal. P.U.C. 1992) (disallowing costs of an overengineered headquarters building).

23/ See Federal Communications Comm'n v. Florida Power Corp., 480 U.S. 245, 251 (1987).

attaching entities to pay for rearrangements of their attachments if the utility in the future must increase the capacity of its facilities for its own purposes). It would be an extreme and inequitable result if a situation were to arise where an electric utility's reserve was eliminated by telecommunications attachments' and the electric utility was later required under Section 224(i) to pay for rearrangement of those unwanted attachments when its forecast reserve needs materialized.

In order to preclude this unjust result, the FCC must permit electric utilities to maintain prudent reserve capacity for reliability and expansion. The amount of such reserve should not be determined as an absolute limit (e.g., 30%), because the need for such reserve will vary depending upon the situation. In an area in which significant building is taking place (e.g., on the outskirts of a rapidly expanding metropolitan area), a larger reserve is appropriate than in an urban area that has already been developed. The FCC should therefore determine the allowable reserve on a case-by-case basis, giving significant deference to the utility's past planning practices and reliability concerns.

B. Unnecessary Duplication of Facilities Should Be Avoided and Facility Owners Must Be Allowed to Reserve Capacity

The Commission seeks comments on whether it has the authority to establish regulations directing capacity allocation schemes, and, if so, whether it ought to do so.[24/]

A threshold issue is whether there is a need for the additional facilities that would be deployed. The Common Carrier Bureau has publicly stated that poles, ducts, conduits, and rights-of-way are "essential facilities," access to which is vital for the deployment of cable television

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[24/] "May we, and should we, establish regulations to ensure that a utility fairly and reasonably allocates capacity?" NPRM ¶ 223.

systems.[25/] In enacting Section 224(f)(1), Congress clearly agreed and extended that logic to apply to all telecommunications carriers. The Commission should not permit these vital national resources to be depleted through the unnecessary duplication of identical facilities. Neither the telecommunications industry nor the Commission can know what new communications systems may be invented in ten, twenty, thirty, or fifty years. In most situations, poles can be quickly replaced with taller poles with relative ease and at modest cost. However, ducts and conduits cannot be duplicated quickly or without considerable expense, construction time, and (in many cases) public inconvenience caused by the excavation of public thoroughfares. It is both reasonable and appropriate that the Commission prudently husband the depletion of these essential resources by ensuring that they are not wholly consumed by unnecessary duplication of facilities when the Commission could require that existing carriers enter into reasonable resale or joint-use agreements with other carriers. The rule should provide for a procedure for denial of access for unnecessarily duplicative facilities in order to retain some capacity for future, advanced telecommunications technologies. Moreover, the presence of unnecessary attachments increases the operations and maintenance costs for all attaching entities, thereby unnecessarily driving up the cost of both electrical service and telecommunications service to the public. Furthermore, issues of reliability and practicality may require telecommunications carriers to have nondiscriminatory access to utility cables in ducts and conduits, rather than access to run additional cables in those ducts and conduits.

[25/] Public Notice, DA 95-35, Mimeo No. 51,600, at 1 (Com. Car. Bur. Jan. 11, 1995).

The U.S. Court of Appeals for the D.C. Circuit recently addressed the scope of the Commission's rulemaking power in Mobile Communications Corporation of America v. FCC.[26/] A narrowband PCS licensee had been awarded a pioneer's preference license before Congress granted FCC auction authority. The licensee appealed the Commission's later imposition of a substantial license fee on the theory inter alia that the FCC lacked statutory authority to impose an auction-based fee far in excess of administrative processing costs.[27/] Describing Section 4(i) of the 1934 Act, as the "necessary and proper clause,"[28/] the D.C. Circuit held that it provides the Commission sufficient authority to impose auction-based fees on pioneer's preference licensees, even though Section 309(j), granting auction authority, is silent on the issue.[29/] In this situation, Section 224 is silent as to the Commission's authority to establish rules requiring fair and reasonable allocation of capacity, but, as in Mobile Communications, Section 4(i) provides the requisite statutory authority.

However, absent stunning prescience, the Commission will be hard pressed to draft a specific allocation rule that fairly addresses the needs of all concerned parties. Neither the electric utility nor the FCC can know whether a competing telecommunications carrier will spring up in the future with an attachment demand. Neither the electric utility nor the FCC can know whether a presently-existing competing telecommunications carrier may in the future desire to extend its

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[26/] 77 F.3d 1399 (D.C. Cir. 1996).

[27/] Id. at 1403.

[28/] Id. at 1404.

[29/] Id. at 1406.

service into a new territory in which another carrier is making a present attachment demand. In order to reserve capacity for future demands, an electric utility should be able to prevent a telecommunications carrier from impeding competition by warehousing all attachment capacity. This can be accomplished by requiring carriers holding leased capacity to actually make an attachment within a reasonable period (e.g., six months) if the utility must deny a competitor's attachment request for want of capacity.

C. Electric Utilities Should Have Wide Latitude To Determine What Constitutes Valid Safety, Reliability, or Generally-Applicable Engineering Purposes Under Section 224(f)(2)

The Commission seeks comments on several issues relating to the statutory exception in Section 224(f)(2) permitting an electric utility to deny access for reasons of safety, reliability, or generally applicable engineering purposes. In particular, the NPRM asks what "specific reasons . . . if any" could justify denial,[30/] whether a "certain minimum or quantifiable threat to reliability" should be required,[31/] and whether the Commission should "establish regulations that expressly impose on utilities the burden of proving that they are justified in denying access pursuant to section 224(f)(2)[.]"[32/]

In response to the Commission's first inquiry -- what specific reasons "if any" could justify denial, there are obviously reasons of safety, reliability, and generally applicable engineering purposes that would justify denial of access. For example, poles have maximum height limitations,

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30/ NPRM ¶ 222.

31/ NPRM ¶ 223.

32/ Id.

pole replacement may be impractical due to location, compliance with confined space and other safety rules may preclude installation of additional facilities in manholes. A Commission regulation suggesting that there may be no such reasons would fly in the face of the express intent of Congress and render half of section 224(f)(2) without any effect. Thus, such a rule would violate the maxim of statutory interpretation that a statute should not be interpreted to be a nullity. Congress, in the statute, directly indicated that there are certainly reasons of safety, reliability, and generally applicable engineering purposes which would justify denial of access, and the Commission must give effect to the unambiguously expressed intent of Congress.[33/]

However, the Commission should not attempt to establish an all-inclusive list of "specific reasons" of safety, reliability, and generally applicable engineering purposes that would justify denial of access. There are numerous factual circumstances in which attachments might be sought, and each may present different "specific reasons" that might justify denial of access. Electric utilities have been in the business of providing reliable power for over a hundred years, and are constantly learning new and better ways to serve the public reliably. It is impossible to boil this experience into a simple and easily applicable laundry list. Reliability of the electric grid is not simple in concept or execution, but is the product of many power engineering factors. If one of those factors changes, other factors must be controlled to ensure reliability. As electrical distribution systems evolve, some current threats to reliability may be eliminated and more attachments

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[33/] See Chevron, U.S.A. v. National Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984).

could become possible. With the advent of competition at the wholesale level[34/] and numerous states considering competition at the retail level, reliability can no longer be maintained simply by overengineering the transmission and distribution systems or by requiring spinning reserve margins of 20% over current load or 5% over system seasonal peak load. In order to survive, much less prosper, utilities must engineer reliability more precisely and at minimal cost. If the FCC were to establish a fixed list of reliability factors in this proceeding, that rule might frustrate this overriding industry imperative.

The FCC should not attempt to legislate reliability standards by rule. Rather, a good compromise between the interests of the electric utility industry and the telecommunications industry would be to provide procedural safeguards rather than substantive engineering standards to ensure that a utility does not use reliability as a red herring to deny access. As perhaps contemplated in the NPRM, the utility may appropriately bear the burden of proof to establish that proposed attachments quantifiably threaten reliability. Delmarva is comfortable in bearing that burden because it has no intention of using reliability as an excuse to deny access and it is confident that its power engineers can credibly demonstrate which proposed attachments threaten reliability. However, once a utility demonstrates through an engineering analysis that proposed attachments quantifiably threaten reliability, that engineering analysis should be considered a rebuttable presumption. Thus, once a utility has made a prima facie case, the burden should shift to the telecommunications carrier seeking the attachments in question to demonstrate that the

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[34/] See Promoting Wholesale Competition Through Open Access, Non-discriminatory Transmission Services by Public Utilities. Order No. 888, IV FERC Regs. & Stats.